

83 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;  
Vicky A. Bailey, William L. Massey,  
Linda Breathitt, and Curt Hébert, Jr.

Bangor Hydro-Electric Company

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Project No. 2534-005

ORDER ISSUING NEW LICENSE

(Issued April 20, 1998)

On December 19, 1988, Bangor Hydro-Electric Company (Bangor Hydro) filed an application pursuant to Sections 4 and 15 of the Federal Power Act (FPA) for a new license for the Milford Project, located on the Penobscot and Stillwater Rivers in Penobscot County, Maine. <sup>1/</sup> The original license expired on December 31, 1990, and since then Bangor Hydro has operated the project under an annual license. The Penobscot and Stillwater Rivers are navigable waters of the United States. <sup>1/</sup> For the reasons stated below, we will issue a new license for the Milford Project.

BACKGROUND

Notice of the application was published on May 16, 1989. Timely motions to intervene were filed by the Maine Council of the Atlantic Salmon Federation, American Rivers, and the Atlantic Salmon Federation (collectively, Conservation Intervenors). Late-filed motions to intervene, which were subsequently granted, were filed by the Penobscot Indian Nation (Penobscot Nation), the U.S. Department of the Interior (Interior), and the Maine State Planning Office.

The Commission's staff issued a draft Environmental Impact Statement (draft EIS) for the three Lower Penobscot River Basin projects in November 1994. Numerous comments on the Draft EIS were filed, and all of these comments were considered in preparing the Final Environmental Impact Statement (EIS). We have fully considered the motions and comments received in determining whether, and under what conditions, to issue this license.

Concurrently with this order, we are issuing an Order on Applications for New and Original Licenses, which discusses issues common to three projects on the

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<sup>1/</sup> 16 U.S.C. §§ 797, 808.

<sup>2/</sup> See 33 FPC 278 (1965) and 1 FERC ¶ 61,104 (1977).

Penobscot and Stillwater Rivers. The discussion in that order is incorporated by reference herein.

## PROJECT DESCRIPTION

The Milford Project consists of the 1,159-foot-long, 20-foot-high, concrete gravity Milford dam, topped with 4.5-foot-high flashboards, the 450-foot-long Gilman Falls dam, a 226-foot-long, 85-foot-wide, 78-foot high powerhouse containing four 1,600 kilowatt (kW) turbine/generator units with an installed capacity of 6.4 megawatts (MW), and a 235 acre reservoir with a gross storage of 2,250 acre-feet. Bangor Hydro proposed to install an additional 1,600 kW turbine/generator unit in an empty turbine pit in the powerhouse. This additional unit will increase the installed capacity of the project to 8.0 MW.

## WATER QUALITY CERTIFICATION

Under Section 401(a)(1) of the Clean Water Act, 1/ the Commission may not issue a license for a hydroelectric project unless the certifying agency has either issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the Clean Water Act provides that the state certification shall become a condition on any federal license or permit that is issued. 1/ On October 23, 1992, the Maine Department of Environmental Protection granted water quality certification for the project, subject to certain conditions. The water quality certification contains 11 conditions, which are attached in full as Appendix A to this order.

## APPLICANT'S PLANS AND CAPABILITIES

In accordance with Sections 10(a)(2)(C) and 15(a) of the FPA, we have evaluated Bangor Hydro's record as a Licensee with respect to the following: (1) consumption improvement program; (2) compliance history and ability to comply with the new license; (3) safe management, operation, and maintenance of the project; (4) ability to provide efficient and reliable electric service; (5) need for power; (6) transmission services; (7) cost effectiveness of plans; and (8) actions affecting the public.

### 1. Consumption Improvement Program

3/ 33 U.S.C. § 1341 (a) (1) .

4/ 33 U.S.C. § 1341 (d) .

Section 10(a)(2)(C) of the FPA, 16 U.S.C. § 803(a)(2)(C), requires the Commission, in acting on a license application, to consider the extent of electricity consumption efficiency improvement programs in the case of license applicants primarily engaged in the generation or sale of electric power. Bangor Hydro submitted a comprehensive and detailed report, entitled "1988 Annual Narrative - Energy Management Services," that covers programs designed to improve the consumption efficiency and reduce peak demands of metered customers.

We reviewed that report and conclude that Bangor Hydro has made a satisfactory effort in good faith to establish and maintain programs for improving efficiency and managing load that comply with Section 10 (a)(2)(c) of the FPA and support the objectives of the Electric Consumers Protection Act of 1986.

## 2. Compliance History and Ability to Comply with the New License

We reviewed Bangor Hydro's license application and its record of compliance with the existing license in an effort to judge its ability to comply with the articles, terms, and conditions of any license issued, and with other applicable provisions of this part of the FPA.

Based on our review of Bangor Hydro's compliance record, we find that Bangor Hydro has complied in good faith with all articles, terms, and conditions of its current license. As a result of our review of its compliance record and the license application, we believe Bangor Hydro that can satisfy the conditions of a new license.

## 3. Safe Management, Operation, and Maintenance of the Project

Bangor Hydro ensures safe management, operation, and maintenance by holding periodic meetings for maintenance and management personnel to review and update safety procedures and maintain a comprehensive safety policy. This includes displaying warning signs and buoys and installing and maintaining safety equipment.

Although Milford is exempt from FERC's five-year inspections, Bangor Hydro retains an independent consultant to inspect the project facilities every five years. In addition, the facility is inspected annually, and remedial/monitoring programs are developed as necessary.

As a result of our review of Bangor Hydro's plans, we conclude that it will be able to manage, operate, and maintain the Milford Project in a safe manner.

## 4. Ability to Provide Efficient and Reliable Electric Service

We reviewed Bangor Hydro's plans and its ability to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

The existing facilities have a hydraulic capacity of 5,630 cfs with an exceedance of 65 percent. Bangor Hydro conducted a study to determine if additional capacity is feasible to use more of the available flow. This study determined that installing an additional unit in two of the existing abandoned bays is feasible; therefore, Bangor Hydro proposes to add a fifth unit to increase capacity from 6.4 MW to 8.0 MW.

Based on our review of the information, we conclude that Bangor Hydro has been operating the project efficiently within the constraints of the existing license and that it will continue to provide efficient and reliable electric services in the future.

#### 5. Need for Power

Bangor Hydro is an investor-owned electric utility serving more than 110,000 customers in the central and southern counties of Maine. As licensed herein, the Milford Project will generate an average of 59.3 gigawatt-hours (GWh) of energy annually for Bangor Hydro.

To assess the need for power, we reviewed not only Bangor Hydro's use and need for the project power, but also the needs in the operating region in which the project is located. The Milford Project is located in the New England Power Pool (NEPOOL) area of the Northeast Power Coordinating Council region of the North American Electric Reliability Council (NERC). NERC annually forecasts electrical supply and demand in the nation and the region for a ten-year period. NERC's most recent report 1/ on annual supply and demand projections indicates that, for the period 1995-2004, loads in the NEPOOL area will grow faster than planned capacity additions. The project displaces nonrenewable fossil-fired generation and contributes to diversification of the generation mix in the NEPOOL area. We conclude that the project's power, its low cost, its displacement of nonrenewable fossil-fired generation, and its contribution to a diversified generation mix will help meet a need for power in the NEPOOL area.

#### 6. Transmission Service

The increased generation of power will have no effect on the existing transmission system. The existing transmission system, which is part of the NEPOOL

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5/ NERC's Electricity Supply and Demand Database, Data set 1995-2004.

network, has more than adequate capacity to transmit the additional 1.6 MW proposed in project redevelopment.

#### 7. Cost Effectiveness of Plans

Bangor Hydro proposes to increase the project capacity by adding a fifth unit, enhancing recreational areas, and installing fish passage. Bangor Hydro has no other plans, except for those periodically required to ensure the project's safety. Based on the license application and past practice, we conclude that Bangor Hydro's plans for constructing fish passage and recreation facilities, as well as its continued operation of the project, will be achieved in a cost-effective manner.

#### 8. Actions Affecting the Public

Constructing fish passage facilities and additional recreational facilities will increase benefits to fisheries and recreation opportunities and, therefore, benefit the public.

### FISH PASSAGE

Interior and Commerce both filed requests that the Commission include in the license a reservation of their authority to prescribe fishways. <sup>1/</sup> Interior subsequently submitted a fishway prescription on February 17, 1995, and revised the prescription on June 22, 1995, and May 20, 1997; and Commerce submitted a prescription on February 16, 1995. <sup>1/</sup> A request for a reservation of prescription authority is not itself a prescription. <sup>1/</sup> And since the request is that a reservation of authority be included in the license, the reservation request cannot be invoked before the license is issued, and thus cannot make an untimely pre-license prescription timely. <sup>1/</sup>

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<sup>6/</sup> The notice that the Veazie application was ready for environmental analysis set March 29, 1993, as the deadline for submitting Section 18 prescriptions.

<sup>7/</sup> As discussed in the lead order issued today in this proceeding, 83 FERC ¶ 61,039 (1998), we decline to address Bangor's arguments with respect to whether Interior is authorized to prescribe a fishway for the fish species at issue in this proceeding.

<sup>8/</sup> See Niagara Mohawk Power Corp., 83 FERC ¶ 61,036 (1998).

<sup>9/</sup> This result is of limited import, as there remain the agencies' requests for reservation of their prescription authority, which

In any event, the agencies' late prescriptions were analyzed in the EIS as recommendations pursuant to FPA Section 10(a) and, as is described below, we adopt most of the agencies' fishway recommendations.

Article 406 requires Bangor Hydro to construct fish passage facilities for the design populations of the species specified by Interior and to provide personnel of the U.S. Fish and Wildlife Service access to the project site and pertinent project records for the purpose of inspecting the fishways to determine compliance with the fishway conditions of the license. 1/

Article 407 requires Bangor Hydro to construct, operate and maintain downstream fishways at the project. This article specifies the downstream facilities which must be constructed and the migration periods during which the downstream facilities must be operated. Article 407 also requires Bangor Hydro to file and implement fishway maintenance and operational plans and to modify the fishways if the effectiveness studies required by Article 409 indicate that modifications are needed.

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we grant, pursuant to our policy. See Niagara Mohawk, supra.

10/ We have not included Interior's recommendation that all fishways be operational within three years as a condition of the license. Construction schedules are an element which must be included in the final design plans which Bangor Hydro must file with the Commission. Bangor Hydro must consult with Interior in preparing the design plans; however, the authority to determine the timing of the construction of project works, including fishways, rests exclusively with the Commission. See Niagara Mohawk Power Corporation, 67 FERC ¶ 61,300 at p. 62,039 (1994).

Article 408 requires Bangor Hydro to construct, operate and maintain upstream fish passage facilities at the project. 1/ The article specifies the migrations periods during which the upstream fishways must be operated and requires Bangor Hydro to file and implement fishway maintenance and operational plans. The article also specifies the river flow level at which the fishways must be operational. Article 408 requires modification of the existing fishway at the powerhouse, specifies attraction flows, and requires installation of walkways and railings along fishways for inspection. 1/

Article 409 requires Bangor Hydro to file and implement a plan to study the effectiveness of the fishways required by Articles 407 and 408. If the study indicates that changes in the project's structures or operations, including flow releases, are necessary, Article 409 requires Bangor Hydro to file and implement a plan to improve the effectiveness of the fishways.

Article 411 contains a reservation of authority for the prescription of fishways under Section 18 of the Federal Power Act by the Secretary of the Interior or the Secretary of Commerce.

## RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES

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- 11/ We have not adopted Commerce's recommendation prohibiting trapping and trucking as a permanent means of fish passage. We have also not adopted Commerce's recommendation to prohibit the inclusion of fish pumps in fish passage design. Commerce's objections to these measures can be addressed during consultation, if they are proposed. We do not believe it is appropriate to categorically exclude either of these measures from consideration.
- 12/ Interior and Commerce recommended several alternative design types for a new fishway at the west end of the spillway. Interior and Commerce can address the need for and design of this fishway during the consultation required by Article 408 or through the exercise of their reservation of prescription authority contained in Article 410.

Section 10(j) of the FPA 1/ requires the Commission, when issuing a license, to include conditions based upon recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act, 1/ to "adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)" affected by the project. 1/

This license includes conditions consistent with the recommendations made by Interior that are within the scope of Section 10(j). Pursuant to Section 10(j), Interior recommended that the project be operated with a minimum flow of 3,800 cfs, or inflow, whichever is less, with a minimization of fluctuations of the impoundment levels. Interior recommended that at least 60 cfs of the minimum flow be released from the Gilman Falls Dam. Interior also recommended that Bangor Hydro obtain ownership of the existing Milford Denil fishway or obtain approval for structural modifications and prepare plans for monitoring minimum flow releases at the Milford and Gilman Falls Dams, fish passage facilities, and dissolved oxygen (DO). These recommendations are within the scope of Section 10(j), and Articles 403, 404, 405, 406, 407, 408, and 409, contain conditions consistent with the recommendations.

Interior submitted a recommendation for monitoring recreational and Penobscot Nation cultural use of the project. This recommendation is not within the scope of Section 10(j), because it is not a recommendation for a specific measure to protect fish and wildlife. The recommendation was considered under Section 10(a)(1). Article 414 of the license contains a condition which requires the licensee to monitor recreational and Penobscot Nation cultural use of the project area, pursuant to the FERC Form 80 Recreation Report.

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13/ 16 U.S.C. § 803(j)(1).

14/ 16 U.S.C. § 661 et seq.

15/ If the Commission believes that any such recommendation may be inconsistent with the purposes and requirements of Part I of the FPA or other applicable law, Section 10(j)(2) requires the Commission and the agencies to attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If the Commission then does not adopt a recommendation, it must explain how the recommendation is inconsistent with applicable law and how the conditions selected by the Commission adequately and equitably protect, mitigate damage to and enhance fish and wildlife.

Maine's recommendations pertaining to fish and wildlife, by executive order of the Governor, are contained in the conditions of the water quality certification. We addressed those conditions in our discussion, above, of the water quality certification.

## STATUS OF PENOBSCOT INDIAN LAND

When the project was constructed, its impoundment inundated part of certain islands in the Penobscot River that had long been occupied by the Penobscot Nation. Relying on this situation, the Interior and the Penobscot Nation aver that Interior has Section 4(e) conditioning power over this project. <sup>1/</sup> Additionally, they contend that the Commission is responsible for assessing annual charges under Section 10(e) of the FPA. <sup>1/</sup>

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<sup>16/</sup> Section 4(e) provides:

That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and shall contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

<sup>17/</sup> Section 10(e) states:

That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission . . . recompensing it for the use, occupancy, and enjoyment of its lands or other property . . . .

There is a proviso applying to "tribal lands embraced within Indian reservations" that states that the Commission is to set charges, "subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984)."

Both provisions apply to "reservations," as defined in Section 3(2) of the FPA. That term covers, inter alia, "tribal lands embraced within Indian reservations." <sup>1/</sup> The major issue in this case is whether the lands flooded by the Milford Project fall within the parameters of that definition, as explored by the Supreme Court in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

In that case, the Court held that lands which the Tuscarora Indians owned in fee <sup>1/</sup> were not encompassed within the FPA's definition of "reservation." <sup>1/</sup> Since the land was not owned by the United States, Section 4(e) was inapplicable. Acknowledging that reservations can mean different things under different statutes, the Court reasoned that the FPA provision was designed as an exercise of Congress' power under the Property Clause of the Constitution. Consequently, only lands owned

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<sup>18/</sup> Under Section 3(2):

"[R]eservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws . . . .

<sup>19/</sup> The Federal government did not have a direct involvement in acquisition of the property. In 1804 the Tuscaroras acquired the land, located in New York, with the proceeds that the Federal government gave them from the sale of property from which the Federal government had removed them in North Carolina. 362 U.S. at 105-06.

<sup>20/</sup> The Power Authority of the State of New York wanted to take property owned by the Tuscarora for use in a licensed project. The Tuscarora resisted, arguing: (1) that the Commission first had to conclude that the license would not interfere with or be inconsistent with the purpose for which the reservation was created or acquired, a requirement reflected in Section 4(e) of the FPA (see supra at n. 16); and (2) that the eminent domain provisions of Section 21 of the FPA did not authorize the taking of Indian lands. The first issue required a determination as to whether this land qualified as a reservation.

by the United States or in which the United States has a proprietary interest are covered by the term under the FPA. 1/

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21/ 362 U.S. at 110-15.

In so ruling, the Supreme Court reversed a lower court decision 1/ that had held that the reference to Indian reservations in Section 3(2) reflected not only Congress' exercise of its power over lands belonging to the United States under Article 4, Section 3, Clause 2 of the Constitution, 1/ but also to an exercise of its authority under the Indian Commerce Clause, Article I, Section 8, clause 3, to act as guardian of Indian tribes. 1/ Where the federal interest in lands within Indian reservations is simply the national interest in the welfare and protection of Indians, the Court reasoned, that is not the sort of federal property interest that qualifies the land as a reservation under the FPA.

The issue in this case similarly rests on whether the lands in question are lands which the United States owns or in which it holds an ownership interest, or instead are lands in which the United States has an interest only by virtue of its more general role as a guardian of Indian interests. The Commission concludes that the requisite federal ownership interest has not been demonstrated in this instance.

A. Historical Background

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22/ Tuscarora Indian Nation v. Federal Power Commission, 265 F.2d 338, 343 (D.C. Cir. 1958).

23/ That term states:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .

24/ 362 U.S. at 114-15. The Indian Commerce Clause is the federal Government's basic source of power over Indian matters. See Felix S. Cohen's Handbook of Federal Indian Law 207 (1982 Ed.) (Hereinafter cited as "Cohen").

The Milford project was originally built in 1906. The islands that were partly flooded by it had been recognized as Indian country since treaties between the state 1/ and the Nation were signed in the late 18th century. 1/ In the years since those 18th century treaties were signed, there had been essentially no federal involvement in Indian matters in the State of Maine. Regulation of Indian affairs was by the state, and when the Milford project was constructed, the developer sought and obtained from state or local officials an easement permitting the necessary flowage over the Indian islands. 1/

The project was federally licensed in 1969, 1/ licensing resting on the project's location on navigable waters. 1/ The Commission's order reflects that no federal lands were involved, and no issue concerning Section 4(e) was raised in that proceeding. 1/

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25/ The State involved at the time was Massachusetts, of which what is now Maine was then a part. In 1819, Maine was separated from Massachusetts, and in 1820 it was admitted into the Union.

26/ In treaties entered into in 1796 and 1818, the Penobscots ceded extensive lands to the State for modest compensation, expressly reserving the islands to themselves. There was an additional sale of four townships in 1833. H.R. Rep. No. 1353 [to accompany H.R. 7919], 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S. Code Cong. & Adm. News 3787 (hereinafter cited as "House Report"); S. Rep. No. 957 [to accompany S. 2829], 96th Cong., 2d Sess. 12 (1980) (hereinafter cited as "Senate Report").

27/ Second Amended Complaint in *Rose M. Taylor, et al. v. Bangor Hydro-Electric Co.*, U.S. District Court Civil No. 1970 (D. Me.) at 3, 6. The details concerning this easement do not appear in the record of this case.

28/ *Bangor Hydro-Electric Company*, 42 FPC 1302 (1969). The license carried a 1941 effective date.

29/ *Id.* at 1303.

30/ *Id.* at 1302. In both the original licensing and this one, the project boundaries were drawn to exclude the Penobscot's islands except those segments that are flooded. However, the flooded parts are necessarily included.

Shortly after that, however, a series of events began which were to affect this case. The Supreme Court has long recognized that: 1/

[T]he United States never held fee title to the Indian lands in the original States as it did in almost all the rest of the continental United States and that fee title to Indian lands, or the pre-emptive right to purchase from the Indians, was in the State . . . .

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31/ Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974), citing Fletcher v. Peck, 6 Cranch 86 (1810); Cherokee Nation v. Georgia, 5 Pet. 1, 38 (1831); Latimer v. Poet, 39 U.S. 4 (1840); Seneca Nation v. Christy, 162 U.S. 283 (1896); Missouri v. Iowa, 7 How. 660 (1849) (The first cited case is hereinafter cited as "Oneida I").

On the other hand, pursuant to its Commerce Clause authority, in 1790 Congress had passed legislation that addressed trade and intercourse with Indians. Among the terms of that legislation was a provision that restricted alienation of Indian lands without the approval of the United States. <sup>1/</sup> Since that time, there has consistently been a federal law on the books, sometimes referred to as the Indian Nonintercourse Act, that continues such a restraint. The current version (dating from 1834) appears in 25 U.S.C. § 177. <sup>1/</sup>

The Supreme Court explained the rationale for such legislation in the Tuscarora case: <sup>1/</sup>

The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties . . . without the consent of congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent.

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<sup>32/</sup> 1 Stat. 137 (1790).

<sup>33/</sup> Section 177 provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

<sup>34/</sup> 362 U.S. at 119. The legislation did not arise there in the context of Section 4(e), but rather in deciding whether property could be condemned under Section 21 of the FPA. See supra at n. 19. The statute was held not to be an impediment to alienation under Section 21, since 25 U.S.C. § 177 does not foreclose action by Congress (362 U.S. at 119).

During the 1960s and 1970s, native interests in claiming their aboriginal rights to land were on the rise, and 25 U.S.C. § 177 presented a major vehicle for accomplishing this. The principal Indian tribes in Maine, the Passamaquoddy and the Penobscots, had ceded most of their lands to the state many years ago, 1/ but no federal approval of the transfers had ever been obtained. In 1972, the Passamaquoddy tribe brought suit in federal district court seeking a declaratory judgment as to the applicability of the Nonintercourse Act to them. The ultimate purpose was to regain possession of the land and damages for trespass.

Later that year, a class action suit was instituted against Bangor Hydro on behalf of Penobscot Nation interests 1/ that likewise alleged a violation of 25 U.S.C. § 177. That particular complaint sought various relief involving those islands that had been reserved for the Penobscot Nation but then made subject to the easements in favor of Bangor Hydro. Again, the allegation was that the requisite federal approval had never been obtained. 1/

The Passamaquoddy eventually prevailed in their claim that 25 U.S.C. § 177 applied to the Indians of Maine. 1/ Over Interior's objection, 1/ the federal courts upheld the existence of a federal trust responsibility over Maine's Indians under that statute. The ruling threw into question the titles to as much as 60 percent of the total

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35/ The Passamaquoddy in the 1970s retained only about 17,000 acres. House Report at 12. The Penobscots retained 4,000-5,000 acres scattered on 100 islands. Settlement of Indian Land Claims in the State of Maine, Hearing on H.R. 7919 before the House committee on Interior and Insular Affairs, 96th Cong., 2d Sess. 159 (August 25, 1980) (hereinafter cited as "House Hearings").

36/ I.e., the owners of waterfront allotments on the Penobscot Indian Reservation and the Nation's Tribal Council.

37/ That case is cited supra at n. 27.

38/ Joint Tribal Council of the Passamaquoddy v. Morton, 529 F.2d 370 (1st Cir. 1975).

39/ Interior contended that the Maine tribes had never been federally recognized and so no trust relationship existed and the Nonintercourse Act did not apply.

land of Maine. 1/ The Passamaquoddy decision also threatened to disrupt long-established Indian-state relationships. 1/

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40/ House Report at 11; Senate Report at 11, 13.

41/ See also *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979); *State of Maine v. Dana*, 404 F.2d 551 (Me. 1979), cert. denied, 444 U.S. 1098 (1980).

All of this prompted government action at both the state and federal level. Following extensive discussions among the interested groups to resolve the situation, in 1980 two pieces of legislation were passed, the Maine Implementing Act (MIA), adopted by the state <sup>1/</sup> and the Maine Indian Claims Settlement Act (MICSA), enacted by the federal government. <sup>1/</sup> MIA is concerned largely with defining Indian-state relationships. <sup>1/</sup>

It was primarily MICSA that addressed the land-related issues important to this case. Through MICSA, Congress ratified all prior transfers and extinguished any Indian title associated with those transfers. This eliminated any problems under 25 U.S.C. § 177 and cleared titles that had been clouded by the aboriginal claims. <sup>1/</sup> Congress also extinguished the claims that had previously arisen. <sup>1/</sup>

At the same time, Congress established a Maine Indian Claim Settlement Fund, of which \$13,500,000 would be held in trust by the Secretary of the Interior for the benefit of the Penobscot Nation. <sup>1/</sup> Similarly, Congress established a Maine Indian Claims Land Acquisition fund, of which \$26,800,000 was to be held by the Secretary of the Interior in trust for the Penobscot Nation. <sup>1/</sup> That second fund was expected to be

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<sup>42/</sup> 30 M.R.S. §§ 6201-14.

<sup>43/</sup> 25 U.S.C. §§ 1721-35.

<sup>44/</sup> Unlike many older Indian statutes, MIA left considerable power with the state to deal with the Indians in the same manner as it did with citizens of the state. Congress ratified this approach. See 30 M.R.S. §§ 6204, 6206; 25 U.S.C. §§ 1721(b) (3) and (4), 1725; Proposed Settlement of Maine Indian land Claims on S. 2829 before the Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. 30 (July 1-2, 1980).

<sup>45/</sup> 25 U.S.C. §§ 1723(a) and (b).

<sup>46/</sup> 25 U.S.C. § 1723(c). According to a November 1, 1994 filing by Bangor, the Taylor v. Bangor lawsuit (supra at nn. 27, 37) was dismissed in 1981 following passage of MICSA.

<sup>47/</sup> 25 U.S.C. § 1724(a). The Penobscots would get the income from it, and the principal would be held intact. A similar amount has set up for the Passamaquoddy Indians.

<sup>48/</sup> 25 U.S.C. § 1724(c). A similar sum was established for the Passamaquoddy Indians and a small sum for another band of

sufficient to purchase about 150,000 acres of average quality forest land, to be used to provide an economic base for the Nation's members.

The existence of the Penobscot Indian Reservation (Reservation), long established under the state's regulation for the lands reserved in the early treaties, was now implicitly recognized in MICSA. <sup>1/</sup> In addition, land within designated areas that was purchased through the Land Acquisition Fund would be added to land in the Reservation to create a larger Penobscot Indian Territory (Territory).

Under MICSA, 25 U.S.C. § 177 would not be applicable to any lands held by or for the nation, but comparable protections were incorporated into MICSA itself. <sup>1/</sup> All land within the Territory is subject to restrictions against alienation.

All land transfers within the Territory are void ab initio, with certain exceptions. First, land can, under appropriate circumstances, be condemned for public purposes under either state or federal law. <sup>1/</sup> It can also be sold or exchanged at the Nation's request, as long as it is replaced with other comparable property, thereby maintaining the established land base. <sup>1/</sup>

B. Discussion

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<sup>49/</sup> 25 U.S.C. § 1722(I) (defining the Penobscot Indian Reservation, by incorporating MIA's definition of the term). MICSA then occasionally refers to the Reservation, generally in the context of distinguishing between aboriginal lands (which are part of the Reservation) and those acquired with funds provided under the settlement (which generally are not part of the Reservation). See 25 U.S.C. §§ 1724(d)(4)(B), 1724(I).

<sup>50/</sup> 25 U.S.C. § 1724(g).

<sup>51/</sup> 25 U.S.C. § 1724(g), (i), (j).

<sup>52/</sup> 25 U.S.C. § 1724(g)(3).

A federal trust responsibility towards Indians, often expressed in terms of a guardian/ward relationship, pervades federal Indian law. The Supreme Court has alluded to that "unique trust relationship" in recent Indian cases, 1/ as well as in very old ones. 1/ It arises out of Commerce Clause authority, 1/ and is predicated on the dependent nature of the peoples involved. 1/

### 1. The Lessons of Tuscarora

In Tuscarora, the Supreme Court squarely rejected the contention that the existence of a federal trust relationship towards Indians is itself sufficient to establish a reservation for purposes of Section 3(2) of the FPA. 1/ According to the Court, the general trust relationship reflects "[t]he national 'paternal interest' in the welfare and protection of Indians." 1/ It does not reflect the requisite exercise of authority under the Property Clause that is necessary to establish the existence of a reservation for FPA purposes.

### 2. The Contention That the United States Holds These Lands in Trust

Interior and the Penobscot Nation suggest that the United States does not simply have a general trust relationship to the Indians, but actually holds the land involved in this case in trust. 1/ However, it is clear that Congress did not provide for or intend

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53/ See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (hereinafter referred to as "Oneida II"). See also id. at 253 and Passamaquoddy, 528 F.2d at 375.

54/ See Chief Justice Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 178, 180-81 (1831).

55/ See Tuscarora, 265 F.2d at 339, 343; Tuscarora Nation of Indians v. Power Authority of New York, 257 F.2d 885, 891 (2d Cir. 1958) cert. denied, 358 U.S. 841 (1958).

56/ Cherokee Nation, 30 U.S. at 181; U.S. v. Candelaria, 271 U.S. 432, 439 (1926); Tuscarora, 265 F.2d at 339, 257 F.2d at 890.

57/ 362 U.S. at 114-15. Compare the Court of Appeal's decision, 265 F.2d at 339, 342-43.

58/ 362 U.S. at 115.

59/ Memorandum dated June 5, 1992, from Interior's Assistant Solicitor, Indian Affairs, to the Eastern Director, Bureau of

that the United States would hold title to the Nation's aboriginal islands in the Penobscot River in trust.

Both the House and Senate Committee Reports contain the following language (emphasis added): 1/

The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian Territory," and newly-acquired tribal lands outside "Indian Territory." Only newly-acquired land within Indian territory . . . will be held in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in common by the Tribe as a whole, will not be taken by the United States in trust. [1/] These lands will simply be subject to a federal restriction against alienation which will prevent their loss or transfer to a non-tribal member.

Consistent with this language, MICSA specifically states that certain newly-acquired lands will be held in trust. 1/ It nowhere provides, however, that the existing tribal lands are to be held in trust. Moreover, it was verified, during the hearings on the legislation, that they would not be held in trust. The House Committee's Special Counsel on Indian Affairs asked if the bill provided that the current lands of the tribes would be held in trust. 1/ Interior's Assistant Solicitor for Indian Affairs replied: 1/

It does not. None of the parties propose that the status of the title of the land be changed in any way except that there is a provision . . . that would subject the lands to Federal restrictions against alienation, which in our view they always were under the Indian Nonintercourse Act.

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60/ House Report at 15; Senate Report at 15. The language represented by the ellipsis deals with the newly acquired tribal lands for another band of Indians.

61/ At one point in this proceeding, Interior suggests that what Congress meant was that tribal lands would be held in trust and that individual assignment lands would be held in restricted fee. Interior June 5, 1992 memo at p. 6. However, that is contrary to what the Committees said, and we must assume that they meant what they said.

62/ See, e.g., 25 U.S.C. § 1724(d) and (e).

63/ House Hearings at 42.

64/ House Hearings at 43 [testimony of Tim Vollman].

The position Interior took before the Commission in 1983 in connection with licensing another Bangor Hydro project on the Penobscot River is consistent with the position that no trust relationship exists. <sup>1/</sup> In that filing Interior stated, in response to the Commission's question concerning who owned the islands in question, that the fee title was held by the State of Maine in trust for the benefit of the Nation, which possesses the right of perpetual use and occupancy, adding that the property was subject to restrictions against alienation. Interior further stated that the status of the property had only changed insofar as the restriction against alienation was imposed under MICSA.

Now, in attempting to establish the existence of a trusteeship, Interior and the Nation cite a term of MICSA dealing with Reservation land taken under eminent domain. <sup>1/</sup> Under that provision, either comparable land must be provided by the entity taking the property or the proceeds must go into the Land Acquisition Fund to be reinvested in other land. Consistent with what the Committee Reports stated would be the treatment of newly-acquired lands, MICSA provides that newly-acquired land will be taken in trust if condemnation occurs under federal law. <sup>1/</sup> However, that does nothing to further the parties' argument that any existing lands are likewise held in trust. Congress' distinction between existing and newly-acquired lands is clearly stated in the Committee Reports.

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<sup>65/</sup> See letter to the Commission from Lawrence Jensen, Associate Solicitor of Interior for Indian Affairs, dated May 17, 1983, regarding Project No. 2600.

<sup>66/</sup> 25 U.S.C. §§ 1724(i) and (j). See Interior June 5, 1992 memo at 3.

<sup>67/</sup> 25 U.S.C. §§ 1725(j), 1725(i)(2).

Interior also suggests that it would be unusual to have a statutory pattern of Indian ownership where some lands are held in restricted status, some are held in trust, and some are unrestricted. <sup>1/</sup> However, that would not derogate from the fact that this is what Congress provided in MICSA. Newly acquired land in the Territory is held in trust; <sup>1/</sup> newly acquired land outside the defined Territory is held in fee without any trust responsibility or restrictions on alienation; <sup>1/</sup> and Indian title to the original land will continue to be held subject to restrictions against alienation.

### 3. The Attempts to Restrict Tuscarora

Interior suggests that Tuscarora is actually very narrow. It avers that the Tuscarora ruling does not apply to "typical" restricted fee land, citing United States v. Candelaria, 271 U.S. 432 (1926), as representing the "typical" situation. <sup>1/</sup> That case involved the Pueblo Indians in New Mexico. Those Indians hold their tribal lands in fee, and Interior suggests that the Court in that case recognized a trust relationship. However, the findings there are inapplicable to this case, because different statutes are involved in the two cases.

The defendants in Candelaria, who were claiming title to lands held by the Pueblos, contended that 25 U.S.C. § 177 did not apply, because the Pueblos held the fee interest in their lands. The Supreme Court rejected that argument, on the grounds that the Nonintercourse Act rests in the United States' responsibility to protect dependant Indian tribes, and does not rest on who holds the land interest. The basis of that legislation is the general federal interest in protecting Indians, as embodied in the Indian Commerce Clause. <sup>1/</sup>

In contrast, as already discussed, the FPA provision is grounded in the Property Clause. The focus in Tuscarora is on who owns the land, and other types of federal interests in Indians are unimportant. Since the instant case deals with the FPA, the focus in this instance must be on the ownership question, and Candalaria has no bearing on the issue.

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<sup>68/</sup> Interior June 5, 1992 memo at 4.

<sup>69/</sup> 25 U.S.C. §§ 1724(b) and (I).

<sup>70/</sup> 25 U.S.C. § 1724. This was apparently done because the state wanted to restrict the area that would be considered Indian Territory, where the reach of state law has certain limits.

<sup>71/</sup> Interior June 5, 1992 memo at p. 7.

<sup>72/</sup> Id. at 439-40.

Interior tries to distinguish the situation where treaties and statutes of the United States are involved from situations where they are not. In this regard, the Nation points to two lower court cases that distinguish Tuscarora in the context of 19th century treaty provisions. 1/ However, neither decision is relevant to the issues here.

Both cases cited stand for the proposition that if specific rights have been conferred on a tribe under a treaty, federal statutes of general application are not sufficient to override the terms of that treaty. 1/ Abrogation of a treaty entered into between the United States and the Indians must be done by express Congressional action.

Whether or not a general term in the FPA is sufficient to override the terms of a United States treaty with the Indians is not in issue in this matter. Neither Interior nor the Nation cites any treaty that has been violated, or that would be violated if the Penobscot property at issue in this case is not found to belong to the United States.

While MICSA is not a treaty, if it had transferred title in the Indian property flooded by Bangor's power projects to the United States, the Commission would give effect to that term in applying Section 4(e) of the FPA. However, no such provision exists. There is no acknowledgment in MICSA or elsewhere that the federal government was purporting to itself take over the fee title to these lands. 1/

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73/ Penobscot filing of June 26, 1989, at p. 4. The cases cited are *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 711 (10th Cir. 1982), and *United States v. Winnebago Tribe*, 542 F.2d 1002, 1005 (8th Cir. 1976).

74/ The Navajo case deals with the applicability of the Occupational Safety and Health Act (OSHA) to a tribal business conducted within an Indian reservation. The contention was that applying OSHA would violate the terms of an 1868 treaty recognizing the Navajo right of self government. The Winnebago case deals with whether the Army Corps of Engineers can exercise eminent domain without express Congressional authorization, when in an 1865 treaty the United States agreed to set aside the land for the Winnebagos "forever."

75/ See discussion at n. 86, where, during the Congressional hearings, Interior indicated to Congress that MICSA was not intended to effectuate any change in ownership of the fee interest.

#### 4. Ownership of the Land in the Project Area

In a 1983 letter to the Commission, Interior indicated that the state held the residual fee. <sup>1/</sup> Interior <sup>1/</sup> and the Nation suggest that a federal District Court in New York recently found that New York (another of the original states) owns no interest in the Indian lands located in that state. <sup>1/</sup> That, of course, is not the critical issue in this case. The key issue here is whether the United States owns a property interest in the lands, and the District Judge in the New York case did not hold that the United States had title to the lands in issue.

The case they cited involved lands that the United States had reserved to the Cayuga Indians in a treaty signed in 1794, which recognized the Indians' right to permanently occupy and use the land. The facts generally paralleled those in the Oneida I and Oneida II cases cited previously, which were decided by the Supreme Court. <sup>1/</sup> Both Tribes (the Cayugas and the Oneidas) were parts of the Iroquois Nation in New York. Treaties were entered into between the United States and the Tribes in the late 18th century, and soon after that, the state entered into arrangements with the Indians for them to cede most of the lands to the state. Approval for the transfers had not been obtained from the federal government as required by law, and, as a result, the Indians were now seeking recovery.

In Oneida I, the Supreme Court held: <sup>1/</sup>

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<sup>76/</sup> See supra at n. 65.

<sup>77/</sup> See Interior June 5, 1992 memo at pp. 1, 6.

<sup>78/</sup> The case upon which they rely is Cayuga Indian Nation of New York v. Cuomo, 758 F.Supp. 107, 115-17 (N.D.N.Y. 1991). Neither party mentions the Supreme Court's decision in Oneida I.

<sup>79/</sup> See supra nn. 31, 53.

<sup>80/</sup> 414 U.S. at 670. The United States can also recognize the Indian title, granting the Indians permanent rights to possession, as it had done there. At that point, the tribe gains a property right which cannot be extinguished by the United States without compensation. See Tee-Hit-Ton Indians v. U.S., 348 U.S. 272,

The rudimentary propositions that the Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State [citation omitted]. But this reality did not alter the doctrine that federal laws, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. This was true even where the State held fee title.

In the Cayuga case, which followed a few years later, the Indians were seeking return of the land, as well as fair rental value for the 200 years since the land was taken over by New York. In defense, the state argued that the federal government could not have divested New York of its fee title (via treaty) without just compensation to the state for that divestiture.

The District Judge explained that the state's interest in the land represented: 1/

[A] mere expectancy concerning the property, with no right vesting in such person until Congress acts to extinguish the Indian interest in the land. See e.g., F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 514.

From that, he concluded that New York's interest in the property at the time did not reach the level of a compensable property interest. 1/

To further understand this, it is instructive to turn to the page cited from Cohen, the leading authority in the field of Indian law. The text quotes the passage from the Supreme Court's opinion in Oneida I, set out above. Cohen then goes on to explain that the underlying fee title and the right to occupancy are separate concepts. He also recognizes that fee title is of very limited significance unless the original Indian title has been extinguished: 1/

Although this fee title can be conveyed subject to the Indian right of occupancy, the holder of the fee title, whether a state or a private party, takes no present possessory interests in the land and cannot validly extinguish Indian title.

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81/ 758 F.Supp. at 116.

82/ 758 F.Supp. at 115-16.

83/ Id.

This is a situation over which the state has no power: 1/

Under this arrangement the federal government has complete discretion to determine when, if at all, the rights of the title fee holder will become possessory rights. Until Congress acts to extinguish the Indian interest, the holder of the underlying fee title or right of preemption has only an expectancy with no further rights in the land.

Obviously, this passage does not reflect the view that the state does not own fee title and, more significantly for purposes of this case, that the United States does hold the legal title. 1/

Indeed, Cohen then goes on to examine the source of the federal government's exclusive control over the extinguishment of Indian title and the restriction of alienation of Indian lands: 1/

[They] constitute federal regulatory action under the Indian Commerce Clause; they do not result from either federal claims to an interest in land owned by tribes or the tenure by which tribal land is held.

In contrast, as already stressed, the key ingredient under the FPA is in fact the federal interest in the land. That interest has not been demonstrated to exist in this case.

##### 5. The Contention that the Commission Has No Jurisdiction to Decide Matters of Federal Ownership

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84/ Id.

85/ See also the statement of Interior's Assistant Solicitor for Indian Affairs during the House Hearings (at 43):

My understanding as to the title of those lands is that fee title is held by the state, but that the tribes have a right of exclusive use and occupancy of those lands.

He further explained that MICSA would not change that.

86/ Id. at 514-15.

Interior suggests that the Commission has no jurisdiction to decide the ownership of the lands in issue. The Commission is doing so only in a very limited context, that of deciding whether project lands qualify as reservations under FPA Section 3(2). <sup>1/</sup> It initially decided the issue fourteen years ago, when, after reviewing the legislative history of MICSA, it found that the United States did not own or have a proprietary interest in the Penobscot Nation's aboriginal lands. <sup>1/</sup> No basis has been established in this case for now finding that the property does belong to the United States.

Section 4(e) permits Interior to compel inclusion of conditions in a Commission license that the Commission deems inappropriate. That is, the Commission must include them even if it believes those conditions are inconsistent with the balancing of power and non-power interests that is the core of Commission decision-making under the FPA. <sup>1/</sup> The Commission determined that it would not include the 4(e) conditions in this case without assessing whether Interior is now claiming authority in excess of what Congress gave it under the FPA. The two cases that Interior cites where the Commission decided not to reach the ownership issue are distinguishable. <sup>1/</sup>

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<sup>87/</sup> If the United States does in fact own the land, it will continue to own it, notwithstanding any Commission ruling.

<sup>88/</sup> Bangor Hydro-Electric Company, 27 FERC ¶ 61,467 at p. 61,875 (1984). The order involved the relicensing of a different project on the same river.

<sup>89/</sup> Sections 4(e) and 10(a).

<sup>90/</sup> In Seneca Nation of Indians, 6 FPC 1025 (1947), no claim of federal ownership was presented. The Seneca Nation asserted that it owned the waters being diverted for power purposes, as well as project lands. It sought compensation for use of its property or termination of the license, determination of the Nation's rights, and favorable consideration in any relicensing. When the Commission asked Interior for its views, Interior informed the Commission that there were no Indian tribal lands subject to Interior's jurisdiction involved. The Commission thereafter declined to rule on who had title to the lands in question.

Washington Water Power Company, 43 FERC ¶ 61,254 (1988), was the final in a series of Commission orders involving a very complex set of facts and claims of state ownership. The question was whether the federal government had retained

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ownership in part of the bedlands of a navigable river or whether its interests had passed to Idaho at the time Idaho became a state. If ownership had not passed, then an Indian reservation was involved and annual charges would be imposed.

The Commission declined to decide the issue, citing a lack of jurisdiction. No annual charges would be collected unless and until Interior and the Indians obtained a judicial determination of their claim. The Tribe unsuccessfully litigated the matter. See Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997). The United States is still pursuing the claim for part of the land, however.

The legal issues presented in that instance were far more complicated than the relatively straight-forward matter now before the Commission regarding what Congress intended when it passed MICSA. As discussed later in this order, the Commission is not reaching some other property-related issues in this case.

## 6. Does the Licensee Have the Requisite Interest?

It is not necessary for the Commission to go further than to decide, as it has here, that the United States does not possess the requisite ownership in the island property long flooded by the project to qualify the land as a Section 3(2) reservation. The issue of where the fee and possessory interests do rest is not entirely without significance to this licensing proceeding, however.

Under the Commission's standard license articles, a licensee is required, within five years of license issuance, to "acquire title in fee of the right to use in perpetuity all lands, other than lands of the United States, necessary for the construction, maintenance, and operation of the project." 1/ Of course, no one has suggested that it is Bangor Hydro that currently holds fee title.

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91/ Article 5 of Form L-3, 54 FPC 1817, 1818 (1975).

The question of who currently holds the possessory (flowage) rights to this particular land is not an issue that the Commission is prepared or willing to consider. Complexities include the existence of the earlier right-of-way granted by the state, as well as the impact of MICSA, which grants federal approval of any prior transfers from, by, or on behalf of the Nation and extinguishes its aboriginal title with respect thereto, as well as associated claims. <sup>1/</sup>

It is the licensee's responsibility to satisfy the Commission that Bangor Hydro possesses the necessary degree of control over the property to carry out its responsibilities under the license. If there should be a disagreement between Bangor Hydro, the Nation, and/or the State of Maine concerning what flowage rights Bangor Hydro holds on lands within the boundary of the Milford Project, then the company is directed to have the matter resolved by the courts. Of course, the provisions of Section 21 of the FPA are available to Bangor Hydro, if it proves necessary to use the right of eminent domain in order to acquire the rights needed under Article 5.

#### 7. Other Considerations

Federal reservations are U.S. lands that have been set aside for specific purposes. What Congress contemplated under Section 4(e) was giving the cabinet secretaries responsible for such lands adequate authority to protect the federal resources involved. <sup>1/</sup> In this instance, however, not only are the lands not federally owned, but it was not the federal government that established the reservation. To be sure, the federal government gave modest recognition to its existence in 1980, but this particular reservation land had long been used for project purposes, with state approval.

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<sup>92/</sup> See 25 U.S.C. § 1723 and discussion supra.

<sup>93/</sup> *Escondido Mutual Water Co. V. LaJolla Indians*, 466 U.S. 765, 775 (1984).

Furthermore, MICSA expressly provides for taking lands needed for public uses pursuant to the laws of the United States. The idea that the land can be taken and diverted to another purpose is inconsistent with any intent that the original purpose of these particular lands must be protected and the lands maintained for use of the Indians. Instead, MICSA's general approach is that the funds received through condemnation will be expended to acquire other, nearby land. <sup>1/</sup> Similarly, the statutory approach under the FPA is to provide for condemnation of non-federal land, <sup>1/</sup> but not of land owned by the federal government. <sup>1/</sup> The fact that these lands are subject to condemnation lends additional support to the view that Congress did not intend that this be construed as federal land.

## INTERIOR'S CONDITIONS

On July 16, 1996, Interior filed conditions pursuant to its claim of mandatory conditioning authority for the Milford Project under Section 4(e) of the FPA. On April 9, 1997, Interior subsequently revised or withdrew a number of the conditions filed in July 1996. For the reasons stated above, we have concluded that Interior does not have mandatory conditioning authority under Section 4(e) for the Milford Project. However, we have considered these proffered conditions as recommendations under the comprehensive planning and public interest standards of Section 10(a) and have included a number of these recommendations as conditions in the new license for the project.

Interior originally submitted eighteen recommendations in its July 1996 filing, withdrawing recommendations 1, 2, 3, 6, 8, and 17 in April 1997. Recommendations 4 and 5 relate to minimum flows and maintaining run-on river operations. These recommendations are similar to the requirements of the water quality certification and Interior's 10(j) recommendations, which are incorporated in Articles 402 and 403 of the license.

Recommendation 7 would require Bangor Hydro to conduct an assessment of the shoreline and prepare and implement a mitigation plan. The Commission has required licensees to control and mitigate erosion caused by project operation, but not erosion caused by natural phenomena associated with the presence of the project. <sup>1/</sup> The EIS states that Interior's documentation filed in support of its recommendation

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<sup>94/</sup> See 25 U.S.C. §§ 1724(g), 1724(j).

<sup>95/</sup> See, Tuscarora at p. 113.

<sup>96/</sup> Id. at pp. 113-14.

<sup>97/</sup> See Duke Power Company, 33 FERC ¶ 61,321 (1985).

attributes erosional losses to the existence of the impoundment rather than the manner in which the project is operated. 1/ In order to ensure that any erosion due to project operations is controlled and mitigated, we are requiring Bangor Hydro to prepare, in consultation with the Penobscot Nation, the Maine State Historical Preservation Officer (SHPO), and Maine Division of Inland Fisheries and Wildlife, and file for Commission approval a shoreline erosion control plan. This requirement is contained in Article 401 of the license.

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98/ EIS at 5-53.

Recommendation 9 would require Bangor Hydro to study and implement measures to protect St. Anne's Church from water damage. St. Anne's Church has sustained water damage which has resulted from a combination of factors including: unfavorable site grading, lack of gutters and downspouts, the existing earthen-floored basement, the installation and subsequent removal of aluminum siding, impermeable soils, and operation of the project. <sup>1/</sup> The Programmatic Agreement for the Milford Project identifies a number of measures to mitigate water damage at St. Anne's Church and requires Bangor Hydro to provide \$37,500 (one-half of the estimated cost of the mitigation measures) for implementation of those measures. Article 415 of the license requires Bangor Hydro to implement the terms of the Programmatic Agreement. The mitigation measures required in the Programmatic Agreement should prevent further water damage to St. Anne's Church.

Recommendations 10 and 11 would require the licensee to excavate two known historic sites and monitor cultural artifacts and protect them from ground disturbing activity, respectively. The Programmatic Agreement requires Bangor Hydro to prepare and implement a Cultural Resources Management Plan (CRMP) which would protect historic properties (such as the historic sites and cultural artifacts) from shoreline erosion, project-related ground-disturbing activities and vandalism, and to mitigate unavoidable adverse effects on historic properties. The provisions of the CRMP encompass these recommendations by Interior. Recommendation 13 would require Bangor Hydro to transfer all Native American artifacts excavated from lands owned by the licensee to the Penobscot Nation when the Penobscot Nation has established a facility for long-term curation and permanent preservation of the artifacts. The Programmatic Agreement requires Bangor Hydro to prepare procedures to effect this transfer and provide for temporary storage of these artifacts at the University of Maine in Orono until the curation and preservation facility is established.

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<sup>99/</sup> Programmatic Agreement, Appendix A, pp. 10-11.

Recommendation 12 would require Bangor Hydro to fund the construction a new curation facility or upgrade the existing facility on Indian Island and provide funding for one-fourth of the compensation for one staff position for the curation facility. Interior estimates that the cost of constructing or upgrading the curation facility would be \$90-100,000 and that funding the staff position would cost about \$12,000 per year. It is appropriate for Bangor Hydro to preserve the Native American artifacts that have been recovered from Bangor Hydro's property and transfer those artifacts to the Penobscot Nation when the Penobscot Nation has established a facility for the long-term curation and preservation of the artifacts. This is required by the Programmatic Agreement. <sup>1/</sup> However, requiring Bangor Hydro to fund the upgrading of the existing museum on Indian Island, or the construction of a new facility, far exceeds the requirements of Section 106 of the National Historic Preservation Act and, under our consideration of the recommendation under Section 10(a), the expense is not reasonable.

Interior recommends that Penobscot Nation representatives be included in all routine and emergency inspections of the project and that, upon notice to Bangor Hydro, be given free and unrestricted access to project lands and works in performance of their official duties. The purpose of the Penobscot Nation's visits is not clear. In the interests of efficiency and safety, the Commission does not routinely invite any party other than the licensee to accompany Commission staff on inspections. The Commission does occasionally invite participation by a specific interested party in safety inspections or compliance audits when the party is in a position to contribute useful information about a specific safety or compliance problem. Any entity may notify the Commission of any compliance or safety issue at any time and may obtain compliance and safety inspection reports, which are available to the public. Most project land would be generally accessible to the public and the Penobscot Nation. However, it is appropriate for the licensee to restrict access to project lands and works when required by safety considerations. Accordingly, we will not require the licensee to provide free and unrestricted access to all project lands and works to representatives of the Penobscot Nation in performance of their official duties.

Interior recommends that Interior and the Penobscot Nation be included in all consultations associated with post-license studies related to archaeological, cultural and historic resources, land and water resources, fisheries and wildlife, navigation, and recreation in the project area. We agree that it is appropriate for Interior and the

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<sup>100/</sup> The Programmatic Agreement requires Bangor Hydro to store the artifacts at the University of Maine at Orono, which is a short distance from Indian Island, and to transfer the artifacts to the Penobscot Nation when a permanent curation and preservation facility has been established.

Penobscot Nation to be included in consultation in these areas and have included Interior and the Penobscot Nation among the parties to be consulted in license articles relating to these resource areas.

Interior has also recommended that Bangor Hydro provide funding to the Penobscot Nation for one full-time employee who would monitor project impacts and participate in post-licensing studies. The EIS found that funding this staff position for the Penobscot Nation would cost \$50,000 per year over the term of the new license. It has not been the Commission's policy to require licensees to fund the licensing or post-licensing participation of groups or organizations. Interior has not provided either evidence or argument sufficient for us to change this policy in this case.

Interior also filed a recommendation for annual charges under Section 10(e) for use of reservation lands. Since we have concluded that the Milford Project does not occupy any reservation lands, as that term is defined in Section 3(2), there is no basis for imposing annual charges for such occupation under Section 10(e).

## COMPREHENSIVE PLANS

Section 10(a)(2) of the FPA requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project. Under Section 10(a)(2), federal and state agencies filed a total of 18 plans. Of these we identified eight as relevant to the project. <sup>1/</sup> No conflicts were found.

## COMPREHENSIVE DEVELOPMENT

Sections 4(e) and 10(a)(1) of the FPA require the Commission, in acting on applications for license, to give equal consideration to the power and development

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<sup>101/</sup> Strategic Plan for Management of Atlantic Salmon in the State of Maine, 1984, Atlantic Sea-Run Salmon Commission; Maine Rivers Study, 1982, Maine Department of Conservation and National Park Service; State Comprehensive River Management Plan, 1987, Maine State Planning Office; State Comprehensive Outdoor Recreation Plan, 1988, Maine State Planning Office; Penobscot River Alewife and American Shad Restoration Plan, 1984, Maine Department of Marine Resources; Inland Fisheries River Management Plan, 1982, Maine Department of Inland Fisheries and Wildlife; Species Assessments and Strategic Plans, 1991, Maine Department of Inland Fisheries and Wildlife; Gulf of Maine Rivers Ecosystem Plan, 1994, U.S. Fish and Wildlife Service.

purposes and to the purposes of energy conservation, the protection, mitigation, and enhancement of fish and wildlife, the protection of recreation opportunities, and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgement will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

The EIS analyzed the effects associated with the issuance of the new license for the Milford Project. It recommends a number of measures to protect and enhance environmental resources, which we adopt, as discussed herein. These measures will provide improved fish passage at the dam, protect fish and wildlife resources by requiring run-of-river operation, enhance recreational resources in the project area and protect cultural resources affected by the project.

In determining whether a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, pursuant to Section 10(a)(1) of the FPA, the Commission considers a number of public interest factors, including the economic benefits of project power.

Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in Mead Corporation, Publishing Paper Division, <sup>1/</sup> the Commission employs an analysis that uses current costs to compare the costs of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and the costs of a project, and reasonable alternatives to project power. The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license. In making its decision, the Commission considers the project power benefits both with the applicant's proposed mitigation and enhancement measures and with the Commission's proposed modifications and additions to the applicant's proposal.

In addition, certain economic factors related to project decommissioning impinge on the decision to issue a new license that are not present in the licensing of new projects. If an existing project is not issued a new license, or if the Licensee declines to accept the new license, the project probably will have to be retired in one form or another. This could range from simply removing the

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<sup>102/</sup> 72 FERC ¶ 61,027 (1995).

generator at the project to major environmental restoration varying from minor measures to dam removal.

As proposed by Bangor Hydro, the project would produce an average of 59.4 gigawatt-hours (Gwh) of energy annually at an annual cost of about \$2,074,000 (34.9 mills/kWh). The current annual value of the project's power would be \$1,491,900 (25.1 mills/kWh). We base this value on the cost of alternative resources, which in this case is the cost of a new combined cycle combustion turbine plant and the regional cost of natural gas. To determine whether the proposed project is currently economically beneficial, we subtract the project's cost from the value of the project's power. Thus, based on current costs, the project, as proposed by Bangor Hydro, would cost about \$582,100 annually (about 9.8 mills/kWh) more than the current cost of alternative power.

As licensed by the Commission, the project will produce about 59.3 Gwh of energy annually at an annual cost of about \$2,518,200 (42.5 mills/kWh). Thus we find the project as licensed by the Commission will cost \$1,031,820 (about 17.4 mills/kWh) more than the current cost of alternative power.

As described above, our evaluation of the economics of the project shows that the power it generates costs more than alternative power. However, as explained in Mead, the economic analysis is by necessity inexact, and project economics is only one of many public interest factors considered in determining whether or not, and under what conditions, to issue a license. <sup>1/</sup> Bangor Hydro is ultimately responsible and best able to determine whether continued operation of the existing project, with the conditions adopted herein, is a reasonable decision in these circumstances.

Based on review of the agency and public comments, review of the environmental and economic effects of the project and its alternatives, and analysis pursuant to Sections 10(a)(1) of the FPA, we find that the Milford Project, with our protection and enhancement measures, will be best adapted to the comprehensive development of the Penobscot River for all beneficial uses.

## LICENSE TERM

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<sup>103/</sup> In analyzing public interest factors, we consider the fact that hydroelectric projects offer unique electric utility system operational benefits and that proposed projects may provide substantial benefits not directly related to utility operations, benefits that would be lost if a license were denied solely on economic grounds. See City of Augusta, et al., 72 FERC ¶ 61,114, at p. 61,599, n. 57 (1995).

Section 15 of the FPA specifies that any new license issued shall be for a term that we determine to be in the public interest, but the term may not be less than 30 years or more than 50 years. Our policy establishes 30-year terms for projects that propose little or no redevelopment, new construction, new capacity, or enhancement; 40-year terms for projects that propose moderate redevelopment, new construction, new capacity, or enhancement; and 50-year terms for projects that propose extensive redevelopment, new construction, new capacity, or enhancement.

Bangor Hydro proposes moderate increase in the project's capacity and we are including conditions in the new license which require moderate expenditures for environmental enhancements. Accordingly, we will issue a new license for a term of 40 years.

### SUMMARY OF FINDINGS

The EIS includes background information, analysis of impacts, discussion of enhancement measures, and support for related license articles. The project will not result in any major, long-term adverse environmental impacts.

The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if operated and maintained in accordance with the requirements of this license.

We conclude that issuing a license for the Milford Project, with our required enhancement measures, will not conflict with any planned or authorized development, and will be best adapted to a comprehensive development of the waterway for beneficial public uses.

### The Commission orders:

(A) This license is issued to Bangor Hydro-Electric Company (licensee) for a period of 40 years, effective the first day of the month in which this order is issued, to operate and maintain the Milford Hydroelectric Project. This license is subject to the terms and conditions of the Federal Power Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Federal Power Act.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interest in those lands, enclosed by the project boundary shown by exhibit G:

<u>Exhibit</u>	<u>FERC Drawing No.</u>	<u>Description</u>
G-1	2534-1001	General Location Map
G-2	2534-1002	General Project Area Map
G-3	2534-1003	Project Boundary Map
G-4	2534-1004	Project Boundary Map
G-5	2534-1005	Project Boundary Map

(2) Project works consisting of the Milford Development and the Gilman Falls dam:

The proposed development at the Milford Dam and powerhouse would consist of: (1) an existing 226-foot-long, 85-foot-wide, 78-foot-high brick powerhouse structure with masonry foundation; (2) existing powerhouse machinery consisting of three identical Kaplan turbines, one existing fixed blade propeller turbine, and one proposed turbine (either fixed blade or Francis type), coupled to generators with a rating of 1.6 megawatts (MW) each; (3) a concrete gravity spillway 397 feet long; (4) a concrete sluiceway and gate 25 feet wide; (5) a 1,159-foot-long concrete gravity dam with a maximum height of about 30 feet and 4.5 foot flashboards; and, (6) all appurtenant facilities.

The existing development at the Gilman Falls Dam consists of: (1) a 49-foot-wide nonoverflow section; (2) a 311-foot-long primary spillway with 4.4 foot high flashboards; (3) a 6-foot-wide sluice gate with a top at elevation 100.8 feet; and, (4) two taintor gates, one 30 feet wide and the other 20 feet wide.

The project works generally described above are more specifically shown and described by those portions of exhibits A and F shown below.

Exhibit A The following sections of Exhibit A filed December 29, 1988:

Pages A-1 through A-20, including Tables A-1 through A-4, describing the existing and proposed mechanical, electrical and transmission equipment.

<u>Exhibit</u>	<u>FERC Drawing No.</u>	<u>Description</u>
F-1	2534-1006	Milford Dam and Powerhouse General Plan and Dam Sections
F-2	2534-1007	Milford Powerhouse General Plan
F-3	2534-1008	Milford Powerhouse Plan and Sections
F-4	2534-1009	Cutting Plans and Sector for Unit 2
F-5	2534-1010	Milford Fishway Plan Sections and Detail
F-6	2534-1011	Gilman Falls Dam Plan, Profiles and Sections

(3) All of the structures, fixtures, equipment, or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibits A, F, and G described above are approved and made part of the license.

(D) This license is subject to the articles set forth in Form L-3, (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States", and the following additional articles:

Article 201. The licensee shall pay the United States the following annual charges:

For the purposes of reimbursing the United States for the costs of administering Part 1 of the Federal Power Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 6,400 kilowatts. This annual charge shall be effective as of the first day of the month in which the license is issued.

In addition to the above charge a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized proposed additional capacity for that purpose is 8,000 kilowatts. This annual charge shall be effective as of the date of commencement of construction of the new capacity.

Article 202. Within 45 days of the date of issuance of the license, the licensee shall file an original set and two duplicate sets of aperture cards of the approved drawings. The set of originals must be reproduced on silver or gelatin 35mm microfilm. The duplicate sets are copies of the originals made on diazo-type microfilm. All microfilm must be mounted on type D (3-1/4 x 7-3/8") aperture cards.

Prior to microfilming, the FERC Drawing Number (2534-1001 through 2534-xxxx) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number must be typed on the upper right corner of each aperture card. Additionally, the Project Number, FERC Exhibit (e.g., F-1, G-1, etc.), Drawing Title, and date of this license must be typed on the upper left corner of each aperture card.

The original and one duplicate set of aperture cards must be filed with the Secretary of the Commission, ATTN: DPCA/ERB. The remaining duplicate set of aperture cards shall be filed with the Commission's New York Regional Office.

Article 203. Pursuant to Section 10(d) of the FPA, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project

for the establishment and maintenance of amortization reserves. The licensee shall set aside in a project amortization reserve account at the end of each fiscal year one half of the project surplus earnings, if any, in excess of the specified rate of return per annum on the net investment. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year, the Licensee shall deduct the amount of that deficiency from the amount of any surplus earnings subsequently accumulated, until absorbed. The licensee shall set aside one-half of the remaining surplus earnings, if any, cumulatively computed, in the project amortization reserve account. The licensee shall maintain the amounts established in the project amortization reserve account until further order of the Commission.

The specified reasonable rate of return used in computing amortization reserves shall be calculated annually based on current capital ratios developed from an average of 13 monthly balances of amounts properly included in the licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rate for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10 year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 301. The licensee shall commence construction of project work within two years from the effective date of this order and shall complete construction of the project within four years from the effective date of the order.

Article 302. The licensee shall, at least 60 days prior to start of construction, submit one copy to the Commission's Regional Director and two copies to the Director, Division of Dam Safety and Inspections, of the final contract drawings and specifications for pertinent features of the project, such as water retention structures, powerhouse, and water conveyance structures. The Director, Division of Dam Safety and Inspections, may require changes in the plans and specifications to ensure a safe and adequate project.

Article 303. The licensee shall, at least 60 days prior to start of construction, file for approval by the Director, Office

of Hydropower Licensing, revised Exhibit F drawings showing the final design of the powerhouse and fishway. A final supporting design report shall be filed simultaneously with the Exhibit F drawings.

Construction shall not commence until the revised Exhibit F drawings are approved.

Article 304. The licensee shall, within 90 days of completion of construction, file for approval by the Commission, revised Exhibits A, F, and G, to describe and show the project as-built, including all facilities determined, by the Commission, to be necessary and convenient for transmission of all of the project power to the interconnected transmission system.

Article 305. The design and construction of those permanent and temporary facilities, including unit 2, the fishways, impounding cofferdams, and deep excavations, that would be an integral part of, or that could affect the structural integrity or operation of the project, shall be done in consultation with and subject to the review and approval of the Commission's New York Regional Office.

Within 90 days from the effective date of the license, the licensee shall furnish the Commission's Regional Director, for his review, a schedule for submission of design documents and plans and specifications for the project. If the schedule does not afford sufficient review and approval time, the licensee, upon request of the Commission shall meet with the Commission staff to revise the schedule accordingly.

Article 306. The licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 307. The licensee shall, within 60 days from the effective date of the license or the approval of the Fifth Safety Inspection Report, whichever is later, file for approval by the Director, Office of Hydropower Licensing, an engineering report which includes drawings, specifications, and supporting calculations necessary to ensure the stability of Gilman Falls Dam.

Article 401. At least 90 days before the start of any land-disturbing or land-clearing activities, the licensee shall file with the Commission, for approval, a plan to control erosion, to

control slope instability, and to minimize the quantity of sediment resulting from project construction (including fishways and recreational facilities) and operation. The licensee shall develop the plan in conjunction with Article 415 of this license.

The plan shall be based on actual-site geological, soil, and groundwater conditions and on project design, and shall include, at a minimum, the following four items:

- (1) a description of the actual site conditions;
- (2) measures proposed to control erosion, to prevent slope instability, to minimize the quantity of sediment resulting from project construction and operation, and to dispose of excavation spoils offsite;
- (3) detailed descriptions, functional design drawings, and specific topographic locations of all control measures; and
- (4) a specific implementation schedule and details for monitoring and maintenance programs for project construction and operation.

The licensee shall prepare the plan after consultation with the Natural Resources Conservation Service, the Maine Department of Inland Fisheries and Wildlife, the Maine State Historic Preservation Commission, the Penobscot Indian Nation, and the U.S. Department of the Interior. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on geological, soil, and groundwater conditions at the site.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin

until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 402. The licensee shall operate the Milford Project in a run-of-river mode for the protection of fisheries resources and recreational opportunities in the Penobscot and Stillwater Rivers.

The licensee shall at all times act to minimize the fluctuation of the reservoir surface elevation by maintaining a discharge from the project so that, at any point in time, flows, as measured immediately downstream from the project tailrace, approximate the sum of inflows to the project reservoir.

Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and the Maine Department of Environmental Protection. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 403. The licensee shall release from the Milford Project a total minimum flow of 3,800 cfs or inflow, whichever is less, from the Milford Project, with the following distribution: 3,268 cfs from the Milford powerhouse, 60 cfs from Gilman Falls dam, and 472 cfs from the west channel, as measured at a location determined in consultation with the Maine Department of Environmental Protection, the U.S. Department of the Interior, the U.S. Geological Survey, and the Penobscot Indian Nation. These minimum flows are for the protection and enhancement of fish and wildlife resources, water quality, and recreation opportunities on the Penobscot River.

This flow may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and the Maine Department of Environmental Protection. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 404. Except as temporarily modified by approved maintenance activities, inflows to the project area, or operating emergencies beyond the licensee's control, the Licensee shall maintain water levels in the Milford impoundment within one foot of normal full pond elevation of 101.7 feet NGVD while flashboards are in place.

The licensee shall at all times act to minimize the fluctuation of the reservoir surface elevations by maintaining a discharge from the development so that, at any point in time, flow, as measured immediately downstream from the tailrace of the development, approximates the inflow to the project reservoir.

The licensee shall, within one year of license issuance, submit plans to the Maine Department of Environmental Protection and the Commission, plans for providing and monitoring the water levels in Milford Impoundment. The Commission reserves the right to require changes to the water level monitoring plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 405. Within 180 days after the date of license issuance, the licensee shall file with the Commission, for approval, a plan to monitor dissolved oxygen of the Penobscot River downstream of the project. Monitoring should be conducted during the months of July and August, for at least one year before and one year following installation of new capacity and should be repeated every five years during the license term.

The purpose of this monitoring plan is to ensure that streamflows below the project, as measured immediately downstream of the project tailrace, maintain a dissolved oxygen content of no less than required by the State of Maine's water quality regulations.

The monitoring plan shall include a schedule for:

- (1) implementation of the program;
- (2) consultation with the appropriate federal and state agencies concerning the results of the monitoring; and

- (3) filing the results, agency comments, and licensee's response to agency comments with the Commission.

The licensee shall prepare the plan after consultation with the U.S. Fish and Wildlife Service, the Penobscot Indian Nation and the Maine Department of Environmental Protection.

The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Monitoring shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 406. Fishways shall be constructed, operated, and maintained to provide effective (safe, timely, and convenient) passage for the Penobscot River design populations of Atlantic salmon, American shad, alewives, and unquantified numbers of blueback herring and American eels at the Licensee's expense. The quantified design populations for each target species is 12,000 Atlantic salmon, 250,000 American shad, and up to 2.1 million alewife.

The licensee shall provide personnel of the U.S. Fish and Wildlife Service, and other Service designated representatives, access to the project site and to pertinent project records for the purpose of inspecting the fishways to determine compliance with the fishway prescriptions.

Article 407. The licensee shall install and operate permanent downstream fish passage facilities at the Milford Project. Fishways shall be maintained and operated to maximize fish passage

effectiveness throughout fish migration period(s) as defined below.

The downstream migration period shall be defined as April 1 to June 30 for Atlantic salmon, July 1 to December 31 for American shad and alewife, August to December 31 for blueback herring, and August 15 to November 15 (or other time periods determined when adequate information is available, and during any spring run that may occur) for American eel. Downstream facilities are to operate whenever generation occurs during the downstream migration period. The licensee shall keep the fishways in proper order and shall keep fishway areas clear of trash, logs, and material that would hinder passage. Anticipated maintenance shall be performed in sufficient time before a migratory period such that fishways can be tested and inspected and will operate effectively prior to and during the migratory periods.

Fishway maintenance and operational plans (including schedules) for all fish passage facilities shall be developed by the licensee in consultation and cooperation with the U.S. Fish and Wildlife Service (FWS), the Penobscot Indian Nation (Penobscot Nation), and other fishery agencies (including the Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources, and the National Marine Fisheries Service). Functional design and final design plans for all fishways shall be developed in consultation and cooperation with the FWS, Penobscot Nation, and other fishery agencies.

Downstream fishways shall consist of: (1) a downstream fishway as described in the licensee's filing dated January 12, 1990 (Response to FERC's Additional Information Request, Items 10 through 13); (2) outer trashracks with 1" clear bar spacing over the upper 12 feet of the rack (or 4" clear bar spacing on outer rack and 1" clear bar spacing on the inner trashracks with two additional entrance ports installed on the inner trashrack); (3) twin 4-foot-wide (8 feet total) weirs at the outer trashrack, capable of passing up to 280 cfs; the location of the weirs is to be west of the edge of the new generation unit (No. 2); (4) attraction flows to the downstream fishway of 280 cfs; (5) a gated bottom intake to the downstream migrant facilities for the downstream passage of American eels; and (6) a downstream migrant conduit designed so that the discharge jet does not impact on any vertical walls.

Within 180 days after the date of license issuance, the licensee shall file, for Commission approval, detailed design drawings of the licensee's proposed permanent downstream fish passage facilities. This filing shall include but not be limited to: (1) the location and design specifications of the passage facilities; (2) a schedule for installing the facilities; and (3) procedures for operating and maintaining the facilities.

The licensee shall include with the filing documentation of consultation, copies of agency and Penobscot Nation comments and recommendations on the drawings, plans, and schedule after they have been prepared and provided to the agencies and Penobscot Nation, and specific descriptions of how the agencies' and Penobscot Nation's comments are accommodated by the licensee's facilities. The licensee shall allow a minimum of 30 days for the agencies and Penobscot Nation to comment and to make recommendations before filing the drawings, plans, and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No construction of downstream fish passage facilities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 408. The licensee shall install and operate permanent upstream fish passage facilities at the Milford Project. Fishways shall be maintained and operated to maximize fish passage effectiveness throughout fish migration period(s) as defined below.

The upstream migration period shall be defined as April 15 to November 15 for Atlantic salmon, May 1 to June 30 for American shad and alewife, June 1 to July 31 for blueback herring, and April 1 to November 30 for American eel. Downstream facilities are to operate whenever generation occurs during the downstream migration period. The licensee shall keep the fishways in proper order and shall keep fishway areas clear of trash, logs, and material that would hinder passage. Anticipated maintenance shall be performed in sufficient time before a migratory period such that fishways can be tested and inspected and will operate effectively prior to and during the migratory periods.

Fishway design, maintenance and operational plans (including schedules) for all fish passage facilities shall be developed by the licensee in consultation and cooperation with the U.S. Fish and Wildlife Service (FWS), the Penobscot Indian Nation (Penobscot Nation), and other fishery agencies (including the Maine Department of Inland Fisheries and Wildlife (MDIFW), Maine Department of Marine Resources, and the National Marine Fisheries Service). Functional design and final design plans for all fishways shall be developed in consultation and cooperation with the FWS, Penobscot Nation, and other fishery agencies.

Upstream fishways shall consist of: (1) modification of the existing Denil fishway adjacent to the powerhouse as described in the licensee's filing dated January 12, 1990 (response to FERC's Additional Information Request, Items 10 through 13); (2) addition of a spillway entrance near the existing log sluice; (3) installation of additional timber baffles in the upstream end of the fishway to facilitate operation at high headpond levels; (4) fishways capable of operating at flows of up to 40,000 cfs as measured at the Eddington gaging station; (5) attraction flows for the fishways provided as follows: (a) for the existing powerhouse fishway, provide 210 cfs total for the two powerhouse entrances, and 100 cfs for the spillway entrance; (b) for the new spillway fishway, provide 100 cfs; and (6) a gated bottom intake to the downstream migrant facilities to provide for the downstream passage of American eels.

The following measures shall be incorporated into the fishway designs for the Milford project: (1) access walkways and railing along the entire length of the existing and future fishways for safety purposes; and (2) a side-mounted vertical fish counting window incorporated into the powerhouse and spillway fishways for enumerating fish runs.

The licensee shall obtain ownership of the existing Denil fishway at the Milford Project owned by the State of Maine or otherwise seek approval from the MDIFW and the Maine Atlantic Sea Run Salmon Commission prior to making any modifications to the existing fishway.

Within 180 days after the date of license issuance, the licensee shall file, for Commission approval, detailed design drawings for permanent upstream fish passage facilities. This filing shall

include but not be limited to: (1) the location and design specifications of the passage facilities; (2) a schedule for installing the facilities; and (3) procedures for operating and maintaining the facilities.

The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No land-disturbing or land-clearing activities related to upstream fish passage shall begin until the Licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 409. Within 18 months after license issuance, the licensee shall file with the Commission, for approval, a plan to monitor the effectiveness of all the facilities and flows provided pursuant to Articles 407 and 408 of this license that will enable the efficient and safe passage of anadromous fish migrating upstream and downstream. The results of these monitoring studies shall be submitted to the agencies listed below and shall provide a basis for recommending future structural or operational changes at the project.

The monitoring plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the appropriate federal and state agencies concerning the results of the monitoring; and (3) filing the results, agency comments, and licensee's response to agency comments with the Commission.

The licensee shall prepare the monitoring plan after consultation with the U.S. Fish and Wildlife Service, Maine Department of Marine Resources, the Maine Department of Environmental Protection, the Penobscot Indian Nation, and the National Marine Fisheries Service.

The licensee shall include with the plan documentation of agency consultation, copies of agency comments and recommendations on the plan after it has been prepared and provided to them, and specific descriptions of how the agencies' comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

If the results of the monitoring indicate that changes in project structures or operations, including alternative flow releases, are necessary to protect fish resources, the licensee shall first consult with the agencies listed above to develop recommended measures for amelioration and then file its proposal with the Commission, for approval. The Commission reserves its authority to require the licensee to modify project structures or operations to protect and enhance aquatic resources.

Article 410. Within 18 months after license issuance, the licensee shall file with the Commission, for approval, a plan to identify and evaluate possible measures to mitigate for any unavoidable losses to Atlantic salmon due to fish passage inefficiencies.

The plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the appropriate federal and state agencies concerning the results of the plan; and (3) filing the results, agency comments, and licensee's response to agency comments with the Commission.

The licensee shall prepare the plan after consultation with the U.S. Fish and Wildlife Service, Maine Department of Marine Resources, the Maine Department of Environmental Protection, the Penobscot Indian Nation (Penobscot Nation), and the National Marine Fisheries Service.

The licensee shall include with the plan documentation of agency consultation, copies of agency comments and recommendations on the plan after it has been prepared and provided to them, and specific descriptions of how the agencies' comments are accommodated by the Licensee's plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the Licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

The licensee shall, within 1 year following completion of the fish passage study required by Article 409 of this license order, submit the results of the mitigation study, along with any recommendations for appropriate mitigation based on the results of the study to the Maine Department of Environmental Protection Bureau of Land Quality Control (BLQC), the Commission and to all consulting agencies. The Commission reserves the right after reviewing the comments and recommendations of the BLQC, the consulting fisheries agencies and the Penobscot Nation, to require such measures as may be necessary to mitigate for unavoidable losses of Atlantic salmon due to fish passage inefficiencies at the Milford Project.

Article 411. Authority is reserved by the Commission to require the licensee to construct, operate, and maintain, or to provide for the construction, operation, and maintenance of, such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce under Section 18 of the Federal Power Act.

Article 412. Within 18 months of license issuance, , the licensee shall construct and provide for the operation and maintenance of the recreation facilities, as described in the licensee's August 7, 1989, Response to the FERC Additional Information Request, and the licensee's Exhibit E, pages E5-8 through E5-13, of the License Application. These facilities include:

- (1) a canoe put-in area at the west side of Gilman Falls dam;

(2) continued maintenance of a canoe landing at Gilman Falls dam;

(3) improved access on the west side of Gilman Falls dam by widening and improving the existing portage trail, improved the parking area by adding gravel, adding a picnic area with a trash receptacle, and improving the concrete retaining wall to allow for safe public access over the wall;

(4) an attempt to acquire an easement from the landowner in order to provide for canoe portage on the east bank of Gilman Falls dam;

(5) an investigation of alternative access sites to the headpond on property that the Licensee owns;

(6) a canoe portage around the east end of the Milford dam and improve the existing path;

(7) at the North Fourth Street site, development of a parking area on city-owned land with about 10 spaces for vehicles with trailers and 18 spaces for vehicles without trailers;

(8) improvement of the existing parking lot at Burr's Store Site, to accommodate about 11 vehicles with trailers and 5 vehicle without trailers; and,

(9) installation and maintenance of directional signs to the above identified recreational sites.

The licensee shall construct these facilities after consultation with the Maine Department of Conservation, the Maine Department of Environmental Protection, the Penobscot Indian Nation, the U.S. Department of the Interior, and the Maine State Historic Preservation Commission. The design and construction of all proposed recreational facilities shall consider the needs of the disabled in accordance with the Americans with Disabilities Act. The facilities shall be shown on the as-built drawings filed pursuant to this license.

The licensee shall file a report with the as-built drawings, which shall include the entity responsible for operation and maintenance of the facilities, documentation of consultation, copies of comments and recommendations on the report after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the report. The licensee shall allow a minimum of 30 days for the agencies to comment prior to filing the report with the Commission. If the licensee does not adopt a recommendation, the filing shall include the Licensee's reasons, based on project-specific information.

Article 413. To ensure safe recreational and navigational use of the Milford Project waters, within 180 days of license issuance, the licensee shall file with the Commission, for approval, a plan for the periodic removal of semi-buoyant logs within the Milford Project impoundment. The plan shall include, but not be limited to, the following:

- (1) description of the removal and disposal methods;
- (2) description of the use, if any, of the removed logs;
- (3) identification of the location used for the disposal of any unused logs;
- (4) an implementation schedule; and,
- (5) the entity responsible for the removal of the semi-buoyant logs.

The licensee shall prepare the plan after consultation with the Penobscot Indian Nation, the Maine State Historic Preservation Commission, the Maine Department of Environmental Protection, and the Maine Department of Conservation. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments and recommendations are accommodated by the plan.

The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the

filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 414. The licensee, after consultation with the City of Old Town, the National Park Service, the Penobscot Indian Nation, the Maine Department of Environmental Protection, and the Maine Department of Conservation, shall monitor recreation and Indian cultural use of the project area to determine whether existing recreation facilities are meeting recreation and Indian cultural needs. Monitoring studies shall begin within six years of the issuance date of this license, and at a minimum, shall include the collection of annual recreation use data.

Every six years during the term of the license, the licensee shall file a report with the Commission on the monitoring results. This report shall include:

- (1) annual recreation and Indian cultural use figures;
- (2) a discussion of the adequacy of the licensee's recreation facilities at the project site to meet recreation demand;
- (3) a description of the methodology used to collect all study data;
- (4) if there is need for additional facilities, the licensee's design of recreational facilities and how such design takes into account the national standards established by the Architectural and Transportation Barriers Compliance Board pursuant to the Americans with Disabilities Act of 1990;
- (5) documentation of agency consultation and agency comments on the report after it has been prepared and provided to the agencies; and
- (6) specific descriptions of how the agency comments are accommodated by the report.

The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the report with the Commission.

Article 415. The licensee shall implement the "Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the Maine State Historic Preservation Officer, for Managing Historic Properties That May Be Affected By A License Issuing To Bangor Hydro-Electric Company, To Continue Operating The Milford Hydroelectric Project In Maine", executed on April 3, 1998, including but not limited to the Cultural Resources Management Plan for the Project. In the event that the Programmatic Agreement is terminated, the licensee shall implement the provisions of its approved Cultural Resources Management Plan.

The Commission reserves the authority to require changes to the Cultural Resources Management Plan at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the Cultural Resources Management Plan, the Licensee shall obtain Commission approval before engaging in any ground disturbing activities or taking any other action that may affect any historic properties within the Project's area of potential effect.

Article 416. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article

is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and water for which the Licensee may grant permission without prior Commission approval are:

- (1) landscape plantings;
- (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings;
- (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and
- (4) food plots and other wildlife enhancement.

To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the Licensee shall:

- (1) inspect the site of the proposed construction;
- (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site; and

- (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline.

To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for:

- (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained;
- (2) storm drains and water mains;
- (3) sewers that do not discharge into project waters;
- (4) minor access roads;
- (5) telephone, gas, and electric utility distribution lines;
- (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary;
- (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and

- (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir.

No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for:

- (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained;
- (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained;
- (3) other pipelines that cross project lands or waters but do not discharge into project waters;
- (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained;
- (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina;
- (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and

- (7) other uses, if: (I) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d) (7) in any calendar year.

At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Hydropower Licensing, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

- (1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

- (2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved exhibit R or approved report on recreational resources of an exhibit E; or, if the project does not have an approved exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

- (3) The instrument of conveyance must include the following covenants running with the land: (I) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the

grantee shall take all reasonable precautions to insure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee shall not unduly restrict public access to project waters.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised exhibit G or K drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(E) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(F) This order is final unless a request for rehearing by the Commission is filed within 30 days of the date of its issuance, as provided in Section 313 of the FPA. The filing of a request for

rehearing does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically ordered by the Commission. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.,  
Acting Secretary.

## APPENDIX A

THEREFORE, the Department APPROVES the above noted application of BANGOR HYDROELECTRIC COMPANY to expand the generating capacity of the Milford Hydro Project, and GRANTS certification that there is a reasonable assurance that the continued operation of the Milford Hydro Project, as described above, will not violate applicable water quality standards, SUBJECT TO THE FOLLOWING CONDITIONS:

## 1. MINIMUM FLOWS

- A. Except as temporarily modified by operating emergencies beyond the applicant's control, as defined below, the facility shall be operated as run-of-river (outflow equals inflow) while passing a total minimum flow of 3,800 cfs or inflow, whichever is less, from the Milford Project, with the following distribution: 3,268 cfs from the Milford powerhouse, 60 cfs from the Gilman Falls Dam, and 472 cfs from the west channel.
- B. Operating emergencies beyond the applicant's control include, but may not be limited to, equipment failure or other temporary abnormal operating conditions, generating unit operation or interruption under power supply emergencies, and orders from local, state, or federal law enforcement or public safety authorities.
- C. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit plans for providing and monitoring the minimum flow required by Part A of this condition. These plans shall be reviewed by and must receive approval of the DEP Bureau of Land Quality Control.

## 2. WATER LEVELS

- A. Except as temporarily modified by normal maintenance activities or by inflows to the project area or by operating emergencies beyond the applicant's control, as defined below, water levels in the Milford impoundment shall be maintained within one foot of normal full pond elevation of 101.7 feet (NGVD) while flashboards are in place.

- B. Operating emergencies beyond the applicant's control include, but may not be limited to, equipment failure or other temporary abnormal operating conditions, generating unit operation or interruption under power supply emergencies, and orders from local, state, or federal law enforcement or public safety authorities.
- C. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit plans for providing and monitoring the water levels in the Milford impoundment as required in Part A of this condition. These plans shall be reviewed by and must be receive approval of the DEP Bureau of Land Quality Control.

### 3. UPSTREAM FISH PASSAGE: PHASE I

- A. The applicant shall continue to operate the existing Denil fishway, with the following modifications, at a minimum: (1) improving the fishway entrance orientation to be in line with the tailrace flow; (2) increasing attraction flow to 210 cfs; (3) raising the walls in the existing fishway to make operative at flows in excess of 20,000 cfs; (4) installing a new exit trashrack; and (5) installing a new video camera counting/monitoring system.
- B. The applicant shall continue to operate the existing Alaskan steeppass fishway, with the following modifications, at a minimum: (1) excavation of natural pools and/or pouring concrete weirs in the ledge outcrop; and (2) deepening an existing channel to the pool below the dam.
- C. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit functional design drawings, a construction schedule, and operating and maintenance plans for all fish passage modifications and facilities required by Parts A and B of this condition, prepared in consultation with state and federal fisheries agencies and the Penobscot Indian Nation. These submittals shall be reviewed by and must receive approval of state and federal fisheries agencies,

FERC and the DEP Bureau of Land Quality Control prior to facilities construction.

4. UPSTREAM FISH PASSAGE: PHASE II

- A. A replacement state-of-the-art upstream fish passage facility shall be installed and operational at the Milford Dam no later than 2 years after the passage at the Milford Dam of alewives and shad equaling the biomass capacity of the modified Denil fishway.
- B. The applicant shall, in consultation with state and federal fisheries agencies and the Penobscot Indian Nation, conduct a study to determine the biomass capacity of the modified Denil fishway to pass alewives and shad. The results of this study shall be submitted to the Department and the consulting agencies within 2 years following the completion of modifications to the existing Denil fishway.
- C. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit functional design drawings, a construction schedule, and operating and maintenance plans for the new fish passage facility required by Part A of this condition, prepared in consultation with state and federal fisheries agencies and the Penobscot Indian Nation. This submittal shall be reviewed by and must receive approval of state and federal fisheries agencies, FERC and the DEP Bureau of Land Quality Control prior to facility construction.

5. DOWNSTREAM FISH PASSAGE

- A. Permanent downstream fish passage facilities shall be installed and operated at the Milford Dam.
- B. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit functional design drawings, a construction schedule, and operating and maintenance plans for the fish passage facility required by Part A of this condition, prepared in consultation with state and federal fisheries agencies and the Penobscot Indian Nation. This submittal shall

be reviewed by and must receive approval of state and federal fisheries agencies, FERC and the DEP Bureau of Land Quality Control prior to facility construction.

## 6. FISH PASSAGE STUDIES

- A. The applicant shall, in consultation with state and federal fisheries agencies and the Penobscot Indian Nation, conduct a study to monitor and evaluate the effectiveness of all fish passage modifications and facilities constructed pursuant to Conditions 3, 4 and 5 of this certification.
- B. The applicant shall, within 1 year following the issuance of a new FERC license for the project, submit a fish passage study plan and schedule, prepared in consultation with state and federal fisheries agencies and the Penobscot Indian Nation. This plan and schedule shall be reviewed by and must receive approval of state and federal fisheries agencies, FERC, and the DEP Bureau of Land Quality Control.
- C. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit the results of the fish passage study, along with any recommendations for structural, operational changes, or additional fishways, based on the results of the study, to the DEP Bureau of Land Quality Control and to all consulting agencies. The Department reserves the right, after opportunity for hearing, and after reviewing the comments and recommendations for the consulting agencies and the Penobscot Indian Nation, to require reasonable structural and/or operational changes to the existing fish passage facilities, or require additional fishways, as may be necessary to effectively pass anadromous fish through the project area. Any such changes or new fishways must also be approved by FERC.

## 7. MITIGATION STUDY

- A. The applicant shall, in consultation with state and federal fisheries agencies and the Penobscot Indian Nation, conduct a study to identify and evaluate possible measures

to mitigate for any unavoidable losses to Atlantic salmon due to fish passage inefficiencies.

- B. The applicant shall, within 1 year following completion of the fish passage study required by Condition 6 of this Order, submit the results of the mitigation study, along with any recommendations for appropriate mitigation based on the results of the study, to the DEP Bureau of Land Quality Control and to all consulting agencies. The Department reserves the right, after notice and opportunity for hearing, and after reviewing the comments and recommendations for the consulting fisheries agencies and the Penobscot Indian Nation, to require such measures as may be necessary to mitigate for unavoidable losses to Atlantic salmon due to fish passage inefficiencies at the Milford Hydro project.

#### 8. RECREATIONAL FACILITIES AND ACCESS

- A. The applicant shall continue to maintain its canoe landing at the Gilman Falls Dam and shall continue to investigate alternative access sites to the headpond on property owned by the applicant for the purposes of ensuring adequate public access to recreational areas.
- B. The applicant shall, in consultation with the Penobscot Indian Nation and other agencies interested in safe recreational and navigational use of the project waters, develop a plan for periodic removal of semi-buoyant logs within the project impoundment.
- C. The applicant shall, in accordance with the schedule established in a new FERC license for the project, submit a schedule for implementing Parts A and B of this condition. This schedule shall be reviewed by the Department of Conservation, the Penobscot Indian Nation and the DEP Bureau of Land Quality Control and must receive approval of the DEP Bureau of Land Quality Control.

#### 9. LIMITS OF APPROVAL

This approval is limited to and includes the proposals and plans contained in the application and supporting documents submitted

and affirmed to by the applicant. All variances from the plans and proposals contained in said documents are subject to the review and approval of the Board or Department prior to implementation.

10. COMPLIANCE WITH ALL APPLICABLE LAWS

The applicant shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements and orders required for the operation of the project.

12. EFFECTIVE DATE

This water quality certification shall be effective on the date of issuance of a new hydropower project license by the Federal Energy Regulatory Commission (FERC) and shall expire with the expiration of this FERC license.